Table of Authorities Cited.

Cases.

Berger v. New York, 388 U.S. 41	9n.
Chapman v. California, 386 U.S. 18	2, 4
Fahy v. Connecticut, 375 U.S. 85	2, 4
Katz v. United States, 389 U.S. 347	6
Monroe v. Pape, 365 U.S. 167	7
On Lee v. United States, 343 U.S. 747	4, 5, 9
Osborn v. United States, 385 U.S. 323	5, 6, 9
United States v. Classic, 313 U.S. 299	7

Statutes.

Civil Rights Act, 42 U.S.C. § 1983	7
Federal Communications Act, § 605	6
Omnibus Crime Control and Safe Streets Act of 1968	7
31 Fed. Reg. 3,400, § 15.11	7

Miscellaneous.

Pitler, "Eavesdropping and Wiretapping—The Aftermath of Ratz and Kaiser," 34 Brooklyn L. Rev, 223, 225	5

Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 358.

JACK DOUGLAS, ALEXANDER CELESTE, ARTHUR J. O'NEILL AND FRANK CELESTE,
Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Commonwealth's main argument, in its brief in opposition (pp. 3-6), is that there was "*evidence sufficient to sustain*" petitioners' convictions even without the challenged tape recordings (Respondent's Brief at pp. 2-6). In other words, the Commonwealth is relying on a claim that the introduction of the tape recording was harmless error. And the Commonwealth apparently assumes that the prevailing Supreme Court rule is that a constitutional error will be deemed harmless if there was other "evidence suffi-

cient to sustain" the conviction.[1] But this is not the rule for evaluating the harmlessness of a constitutional error; indeed, the precise standard relied on by the Commonwealth in its brief was explicitly rejected by the Supreme Court in the recent cases of *Fahy* v. *Connecticut,* 375 U.S. 85, and *Chapman* v. *California,* 386 U.S. 18, a dispositive line of cases of which the Commonwealth is apparently unaware. In *Fahy* the Court said: "*We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of.*" The Court thus explicitly rejected the standard repeatedly relied on by the Commonwealth here. It adopted instead a much narrower standard of harmless error: There must be no "*reasonable possibility* that the evidence complained of *might have* contributed to the conviction." 375 U.S. at 86, 87 (emphasis added). In *Chapman* the Court squarely placed the burden on the state "to prove that there was no injury or to suffer a reversal . . ." 386 U.S. at 24. This burden can be satisfied only if this Court

---

[1] The Commonwealth refers to this standard, and to no other, at least four times in its brief:

"The petitioners' convictions may be sustained wholly apart from the single taped conversation admitted in evidence." Respondent's Brief at p. 2.

"The Petitioners' Convictions Are Sustainable Wholly Apart From the Single Taped Conversation Admitted in Evidence." *Id.* p. 3.

"It is evident from an examination of the transcript of the trial and of the opinion of the Supreme Judicial Court, *Commonwealth* v. *Douglas,* 1968 Mass. Adv. Sh. 641, P. App. A 21, that substantial and comprehensive evidence sufficient to sustain a conviction on each substantive offense had been presented by the District Attorney *before* the recording complained of by the petitioners was played for the jury." *Ibid.*

"Admissible evidence presented relating to events prior to October 17 was more than sufficient to sustain all of the convictions." *Id.* p. 4.

is "able to declare a belief that it was harmless beyond a reasonable doubt." *Ibid.* Thus the applicable standard for determining harmlessness is a far cry from the standard relied on by the Commonwealth.[2] And surely the Commonwealth cannot be said to have satisfied its difficult burden of proving harmlessness "beyond a reasonable doubt."

The challenged evidence in this case is demonstrably not harmless under the applicable Supreme Court standards. The challenged evidence—a tape recording—was the only non-testimonial evidence offered by the Commonwealth. That the jury might well have disbelieved the testimony of the Commonwealth's chief witness was implicitly recognized by the court below, which observed:

> "On somewhat conflicting evidence the facts set out below could have been found. The jury were not required to believe, or to regard as controlling, other evidence, which might tend to reflect adversely on the testimony and the behavior of the Commonwealth's principal witness, Melvin Sacks . . ." (Petitioners' Appendix at pp. 21-22).

Indeed, there is a very high likelihood that the jury did, in fact, disbelieve some of the testimonial evidence offered by Mr. Sacks, the Commonwealth's chief witness. In cataloguing the testimonial evidence offered by the prosecution, the Commonwealth places first the fact that "Sacks testified that on August 24, 1966, Alexander Celeste struck Sacks in the face and kicked him in the stomach." What

---

[2] The Commonwealth obviously confused the standard for determining the harmlessness of an error with the very different standard for directing a verdict. Needless to say, the Supreme Judicial Court did not, in this case, even suggest that the admission of the challenged tape was harmless. Nor, in fact, did the Commonwealth raise this frivolous claim in the lower court.

the Commonwealth omits to inform this Court is that petitioner Celeste was *acquitted* by the jury of the assault and battery charges growing out of this alleged incident.[3] It seems likely, therefore, that the jury disbelieved some, if not all, of Mr. Sacks' testimony; and that it placed great weight upon the "objective" character of the tape recording. Thus the Commonwealth's own catalogue of evidence would seem to establish—and certainly to create "a reasonable possibility"—that the introduction of the tape recording "might have contributed to the conviction." 375 U.S. 87. As this Court observed in *Chapman:* "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless." 386 U.S. at 23-24. Accordingly, the Commonwealth cannot satisfy its burden of proving beyond a reasonable doubt that the claimed error in admitting the challenged evidence was harmless. This case, then, is an entirely suitable "vehicle for deciding" the issues raised in the petition (*cf.* Respondent's Brief at p. 2).

II.

The Commonwealth's second argument (pp. 6-9) begins with the strange observation that petitioners did not refer to the case of *On Lee* v. *United States,* 343 U.S. 747, in its brief in the court below, and thus "the *On Lee* claim is being pressed in this Court for the first time" (Respondent's

[3] The court below explicitly recognized this. It said: "Sacks's testimony was that Celeste then hit him in the face, and kicked him in the stomach. See, however, the verdict that Alexander Celeste was not guilty of assault and battery (fn. 1)" (Petitioners' Appendix at p. 23). The Commonwealth says that its catalogue of evidence derived from the opinion of the Supreme Judicial Court. It is difficult to understand why it chose to mislead this Court by not indicating, as that court did, that this important piece of evidence was apparently disbelieved by the jury.

Brief at p. 6). A moment's reflection indicates how absurd that argument is in the context of this case. The *On Lee* case goes *against* petitioners' position; of course petitioners would not rely on that case below. Nor could they appropriately ask a *state* court to *overrule* a United States Supreme Court decision. This is the first appropriate occasion for pressing our claim that the *On Lee* case should be overruled by the Court that decided it.[4]

The Commonwealth also argues (pp. 7-9) that it "hardly seems important to grant the petitioners an opportunity to argue the issue whether or not society is prepared to recognize their expectation [of privacy] as reasonable when the answer is obvious" (Respondent's Brief at p. 8). But is the answer so obvious? In the recent case of *Osborn* v. *United States,* 385 U.S. 323 (1966), the defendant's expectation of privacy was no greater than the expectations here (see Petition at pp. 12-14). In both cases the words recorded constituted a crime. Yet in *Osborn,* the Court rested its decision on the fact that the prosecutor there employed "'"the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment"' as 'a precondition of lawful electronic surveillance'" (385 U.S. at 330). Thus the answer to the question raised by this petition is far from obvious. This is reflected in the division of the courts (see Petition at pp. 14-20) as well as in the academic journals (see Petition at pp. 13-14; see also Pitler, "Eavesdropping and Wiretapping—The Aftermath of Katz and Kaiser," 34 Brooklyn L. Rev. 223, 225: "It is unclear from Katz whether the Osborn type of electronic surveillance requires prior judicial authorization").

---

[4] Although *On Lee* was not referred to by name in the proceedings below, the arguments and decision did focus on the issues raised by that case. There is, of course, no requirement that specific cases be cited below; only that the issues be raised. The Commonwealth does not—nor could it—claim that these issues were not raised or resolved below.

Moreover, it is important to recall that petitioners are not asking this Court to hold that "threats of extortion and intimidation go unheard," as the Commonwealth suggests (p. 8). Petitioners are asking this Court to decide whether it shall be the police or a magistrate who determines when there is sufficient cause to warrant overhearing and recording of conversations intended to be private. And the Commonwealth has proposed no reason why this decision should not be left to a disinterested judicial officer, at least where, as here, there are no "legitimate needs of law enforcement [which] . . . demand specific exceptions. . . ." *Katz* v. *United States,* 389 U.S. 347, 362 (Harlan, J., concurring).

III.

Petitioners asked this Court to interpret a regulation promulgated under section 605 of the Federal Communications Act to require prior judicial authorization as a condition to lawfully recording a conversation under the circumstances of this case (Petition at pp. 17-18). The regulation, which generally prohibits wiretaps with the consent of only one party, makes exception for recording by any law enforcement officers conducted under "lawful authority"; and it is petitioners' view that "lawful authority" requires prior judicial approval of the sort obtained in *Osborn* v. *United States,* 385 U.S. 323 (1966), but not obtained here. The Commonwealth's only response to this argument is to point out that a "phrase similar to 'under lawful authority' is used in the recently enacted Omnibus Crime Control and Safe Streets Act of 1968. . . ." The phrase to which the Commonwealth refers is the familiar one, "under color of law." But this phrase is not at all similar to "lawful authority"; indeed, its usual meaning is diametrically

opposite. Under *color* of law usually suggests an *illegal or unlawful* act "made possible only because the wrongdoer is clothed with the authority of state law . . ." *United States* v. *Classic,* 313 U.S. 299, at 326. This is the way that phrase is used in the Civil Rights Act, 42 U.S.C. § 1983; see *Monroe* v. *Pape,* 365 U.S. 167. Surely, the promulgators of 31 Fed. Reg. 3,400, § 15.11, did not intend to authorize such illegal abuse of the police uniform. The phrase "under lawful authority" suggests something quite different from "under color of law." It suggests that the authority under which the police are acting is *actually* lawful, and not merely *colorably* lawful. And petitioners submit that the only authority that can lawfully authorize the kind of wiretap involved here is a disinterested judicial officer. To read the regulation as the Commonwealth proposes would give unlimited license to the police by virtue of their uniform alone and without reference to the actual lawfulness or lawlessness of their activities. Such an interpretation would render the regulation nugatory.

The Commonwealth also points to the fact that the recently enacted Omnibus Crime Control and Safe Streets Act of 1968 would seem to permit the kind of wiretap in question here. In the first place, that statute was simply not in effect at the time the wiretap or the trial in this case occurred. Thus the new statute can have no effect on petitioners' rights. In the second place, the conflict that petitioners have asked this Court to resolve is a conflict over the proper interpretation of the United States Constitution, not of a statute. The Courts that have required prior judicial approval have done so because they read the Constitution as requiring it. It is inconceivable that the enactment of a new statute will make them change this position. Indeed, the enactment of a statute apparently in conflict with the constitutional holdings of two Circuits

makes resolution of this issue even more pressing. Law-enforcement authorities and the public have a right to know whether the Constitution does, or does not, require prior judicial approval before a wiretap, such as the one here at issue, can be admitted into evidence. And this case provides an appropriate vehicle for deciding that critical constitutional question.

IV.

The Commonwealth's final argument (IV, pp. 11-13) is indeed difficult to understand and relate to this case. It asks this Court to postpone "an adjudication" of petitioners' claims until "a time at which the operative effects of [Massachusetts' newly enacted wiretap statute] may be fairly assessed" (Respondent's Brief at p. 13). But the highest court of Massachusetts held in this very case, and in others since, that the circumstances at issue here gave rise to "no violation of G.L. c 272 § 99. . . ." (Petitioners' Appendix at p. 28). And the newly enacted statute explicitly exempts recordings "if the officer is a party to such communication or has been given prior authorization to record or transmit the conversation by such a party. . . ." (Respondent's Brief at p. 12). In other words, the Massachusetts legislation—both new and old—provides no protection whatever against the kind of recording at issue here.[5] What conceivable benefit can possibly be obtained by postponing "an adjudication" of the issues raised in this case? The "operative effects" of the Massachusetts legislation on the practice challenged here "may be fairly assessed" right

[5] The Commonwealth appears to concede this on page 9, note 6, when it says that "Recently enacted Massachusetts legislation similarly allows the acts complained of by petitioners without prior judicial authority. . . ."

now: it has no operative effect whatever; it authorizes this kind of recording without any reservations or safeguards. And this is precisely what petitioners challenge as unconstitutional.[6]

Conclusion.

In this reply brief, petitioners have responded to the major arguments made by the Commonwealth. In closing, it is important to point out that the Commonwealth has left many of petitioners' arguments unchallenged. Most important, they apparently concede—as they should—that there is a clear and direct conflict between the Circuits, and between two Circuits and the Massachusetts Supreme Judicial Court (see Petition at pp. 14-19). The existence of such conflicts is a prime criterion for this Court's decision to grant the writ of certiorari. The Commonwealth also apparently concedes that there is a conflict between the decision below and between the rather strong dictum of this Court in the *Osborn* case. Nor does the Commonwealth appear to dispute our claim that *On Lee* is no longer good law and should be overruled. Finally, the Commonwealth presents no substantive arguments against the requirement

---

[6] The Commonwealth attempts to obtain undue mileage from its claim that the new statute "evidenced a cooperation with the letter as well as the spirit of the Berger opinion." It did not "cooperate" at all with "the spirit" of *Berger* in the area relevant to this case. In *Berger* the Court cited the *Osborn* case with approval and called the recording there "an invasion of the privacy protected by the Fourth Amendment" which was "admissible because of the authorization of the judges . . ." 388 U.S. 41 at 56-57. How, then, can it be said that a statute—like the Massachusetts one—which specifically authorizes that kind of "invasion" without prior judicial authorization, "evidenced a cooperation with the letter as well as the spirit of the Berger opinion?"

of prior judicial approval for wiretaps of the kind involved here.

For the foregoing reasons, petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

ALAN M. DERSHOWITZ,
Langdell Hall,
Cambridge, Massachusetts 02138,

MONROE L. INKER,

CRANE, INKER & OTERI,
41 Tremont Street,
Boston, Massachusetts 02108,

JOSEPH S. OTERI,

CRANE, INKER & OTERI,
41 Tremont Street,
Boston, Massachusetts 02108,

HARVEY A. SILVERGLATE,

CRANE, INKER & OTERI,
41 Tremont Street,
Boston, Massachusetts 02108,
Counsel for Petitioners.